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JAMES M. BOYD, JR., Of Counsel

July 19, 2010

Mr. Phillip Isenberg
Chair, Delta Stewardship Council
650 Capitol Mall, 5th Floor
Sacramento, California 95814

Re: Comments on Second Draft Interim Delta Plan

Dear Mr. Isenberg:

We appreciate the opportunity to comment on the second draft of the interim Delta Plan that the Council's staff released on July 15, 2010. On behalf of our firm's clients, we have the comments below. Primarily, that draft is not clear about how the proposed "Delta Water Flow Plan" would be a "tool" that would help the Council evaluate its actions. That section of the second draft plan suggests that the Council would use the State Water Resources Control Board's (SWRCB) pending Delta flow criteria as a basis for that plan, but that would be inappropriate given that the legislation that governs both the Delta Plan and the SWRCB's pending criteria states that they are to accomplish different missions.

Our Firm's Clients

As I have mentioned in prior comments to the Council, our firm represents a number of public water suppliers located upstream of the Delta. These suppliers include Browns Valley Irrigation District, the City of Folsom, the City of Roseville, Sacramento Suburban Water District, San Juan Water District, Yolo County Flood Control and Water Conservation District and Yuba County Water Agency. These water suppliers hold some of the oldest appropriative water rights in California, serve large portions of four northern California counties and include the primary source of water transfers to the Central Valley Project and the State Water Project over the last 20 years.

Comments on Second Draft Interim Plan

We have three major comments on the second draft Interim Plan.

1. *The Interim Delta Plan Should Clearly State What A Delta Water Flow Plan's Purpose Would Be And Should Not Base Any Such Plan Primarily On The SWRCB's Delta Flow Criteria*

On page 28, the second draft Interim Plan states the following under the heading "Delta Water Flow":

The Delta flow criteria developed by the SWRCB under Water Code Section 85086 with contributions of the DFG under Section 85084.5 will be one of the early considerations of Delta water flow. Over time, additional information will be added, including whatever results from the BDCP, plus the additional instream flow studies required by Section 85057 . . . Water flows must include plans to ". . . promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals." (Section 85304).

The second draft Interim Plan says that, along with other parts of chapter IV of the Interim Plan, this "Delta Water Flow" plan would "provide a framework for organizing information as a basis for Council action in a wide range of activities under the Interim Plan" and that these "tools focus on core responsibilities of the Council to achieve the coequal goals and organize much of what will be required for decision making." (Second draft Interim Plan, p. 27.)

What these statements leave unclear is whether the Council would use the "tools" – including the "Delta Water Flow" plan – as standards against which the Council would evaluate proposed actions and plan contents or whether those "tools" are simply headings under which the Council will place information to organize it. This is a key distinction. To the extent that the Interim Plan will be a framework for the long-term Delta Plan, then the Interim Plan is the interested parties' best indication of what regulatory standards the Council may propose. If the proposal is that the SWRCB's Delta flow criteria would be adopted in the Delta Plan as regulatory standards, then that point should be made as clear as possible.

Such an approach, however, would be inconsistent with SBX7 1. As the second draft Interim Plan recognizes, the Delta Plan is governed by the coequal goals related to the Delta ecosystem and water-supply reliability. (Second draft Interim Plan, pp. 10-11.) In contrast, SBX7 1 states that the SWRCB's pending Delta flow criteria will not be "predecisional" – that is, they will not be binding – and will only reflect considerations of protecting "public trust resources." (Water Code sec. 85086(c)(1).) As the California Supreme Court recognized in its seminal public trust decision, determining what is necessary to protect such resources is only part of the equation, effectively only one-half of the coequal goals. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 445-446, 452.) Accordingly, the Council should not incorporate the SWRCB's Delta flow criteria – whatever their ultimate content – as decisionmaking standards because those criteria would promote only one coequal goal.

2. *The Description Of Interim Plan Processes Should Include The Statutory Definition Of "Covered Action"*

The second draft Interim Plan's Section III includes a lengthy quotation of the statutes enacted by SBX7 1 that will govern the Council's relationships with other agencies. (Second

draft Interim Plan, pp. 17-20.) This quotation, however, does not include a quotation of SBX7 1's definition of "covered action," which will govern the scope of actions over which the Council will have consistency-review authority. The quotation of the relevant statutory authorities in the second draft Interim Plan's Section III therefore should include a quotation of Water Code section 85087.5, which is the statutory definition of "covered action."

3. *Appendix IV Should Cite Statutes Protecting Water Rights And Area-of-Origin Rights As Supporting Sustainable Water Use*

Appendix IV collects legal authorities that support implementation of Water Code section 85020's policy objectives for the Delta Plan. One of those objectives is "Promote statewide water conservation, water use efficiency, and sustainable water use." Appendix IV of the second draft Interim Plan cites primarily statutes concerning water conservation under this heading.

To the extent that the above policy objective applies to regions upstream of the Delta that necessarily must rely on local resources to meet water demands because other supplies are not available, this portion of Appendix IV also should include citations to the legal authorities that establish water-right priorities and to the area-of-origin laws. Collectively, these authorities provide the legal basis that allows upstream areas to rely on their local water sources to sustainably meet their local water demands. Accordingly, the following authorities should be included in the portion of Appendix IV that concerns Water Code section 85020(d):

- (A) Water Code sections 1450 and 1455 (concerning water-right priorities);
- (B) *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243 (California Supreme Court: "[W]ater right priority has long been the central principle of California water law")); and
- (C) Water Code sections 1215 through 1222, 10505, 10505.5, 11128, 11460 through 11463 and 12200 through 12220 (area-of-origin laws).

Conclusion

Thank you again for the opportunity to comment on the second draft Interim Plan. We look forward to participating the Council's further development of that Plan.

Kind regards,


Ryan S. Bezerra